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August 7, 1995

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

William F. Canton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

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Re: In re Application of Ellis Thompson Corporation
For Facilities in the Domestic Public Cellular Radio
Telecommunications Service on Frequency Block A
in Market No. 134, Atlantic City, New Jersey
CC Docket No. 94-136
File No. 14261-CL-P-134-A-86

Dear Mr. Canton:

Transmitted herewith on behalf of Ameritel is one (1) original and fourteen (14) copies of its *Application for Review Of Review Board Decision Affirming Denial Of Petition To Intervene Under 47 USC 309(e)* filed with respect to the above-referenced proceeding.

Please contact me directly in the event of any question with respect to this matter.

Respectfully submitted,



Howard S. Robbins
Attorney for Ameritel

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 7 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application of)	
)	
ELLIS THOMPSON CORPORATION)	CC Docket No. 94-136
)	
For Facilities in the Domestic Public)	File No. 14261-CL-P-134-A-86
Cellular Radio Telecommunications)	
Service on Frequency Block A in)	
Market No. 134, Atlantic City, New Jersey)	
)	
To: THE COMMISSION)	DOCKET FILE COPY ORIGINAL

**APPLICATION FOR REVIEW OF REVIEW BOARD DECISION
AFFIRMING DENIAL OF PETITION TO INTERVENE UNDER 47 USC 309(e)**

Ameritel, by its attorney and pursuant to 47 CFR 1.115(a), hereby requests review of the *Memorandum Opinion and Order*¹ issued by the Review Board which affirmed a *Memorandum Opinion and Order*² issued by Administrative Law Judge Joseph Chachkin (ALJ) which denied Ameritel's "Petition To Intervene" ("Petition") in the above captioned proceeding.³ As demonstrated herein⁴, the *Review Board MO&O* conflicts with 47 USC 309(e) and 47 CFR 1.223(a), involves a question of law which has not previously been resolved by the Commission, and is expressly founded upon erroneous findings as to important and material questions of fact. Ameritel respectfully requests that the Commission reverse the *Review Board MO&O*, grant Ameritel's Petition To Intervene as a matter of right, and designate Ameritel as a party in interest in the above-captioned proceeding.

¹*Memorandum Opinion and Order*, FCC 95R-13 (July 7, 1995) ("*Review Board MO&O*"). A copy of the *Review Board MO&O* is attached hereto as Exhibit 1.

²*Memorandum Opinion and Order*, FCC 95M-68 (March 7, 1995) ("*ALJ MO&O*"). A copy of the *ALJ MO&O* is attached hereto as Exhibit 2.

³A copy of the Petition is attached hereto as Exhibit 3.

⁴This application for review is limited to denial of the petition for intervention as of right pursuant to 47 CFR 1.223(a).

1. *Background:* A *Hearing Designation Order* in the above captioned proceeding was published on January 5, 1995 and did not name Ameritel, Inc., the fifth-selected mutually-exclusive ("MX") applicant for the nonwireline cellular authorization to serve the Atlantic City, New Jersey Metropolitan Statistical Area. Ameritel, a general partnership under Ohio law, as the successor-in-interest to Ameritel, Inc., filed the aforesaid Petition seeking intervention as of right pursuant to 47 USC 309(e) and 47 CFR 1.223(a), as more fully set forth in the *Review Board MO&O* at ¶3. The ALJ denied the Petition seeking intervention as of right, stating:

Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the nonwireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion. In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties, based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity called Ameritel, Inc. was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at very least, file a fictitious name report with the Secretary of State (see Amcell Opposition, Exhibit 1).

ALJ MO&O at ¶3. The Review Board affirmed the ALJ's denial of intervention solely because:

Ameritel's original petition to intervene did not establish, as required by 47 USC § 309(d) and (e) of the Communications Act of 1934, as amended, and 47 CFR § 1.223(a) of the Commission's Rules, that Ameritel is a mutually exclusive applicant and therefore entitled to intervene as a "party-in-interest." [Emphasis added.]

Review Board MO&O, at ¶1. The Review Board explained the basis for its decision to affirm the denial of the petition to intervene as of right as follows:

Ameritel's argument ignores a fatal legal flaw in its original petition to intervene: its petition did not contain *specific allegations of fact* sufficient to show that Ameritel was the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant, and, therefore, a party-in-interest. *Section 309(d)(1) of the Communications Act specifically provides:*

The petition shall contain specific allegations of fact sufficient to show that petitioner is a party in interest.... Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

Section 1.223(a) of the Commission Rules requires a party-in-interest to file "under oath and not more than 30 days after publication in the Federal Register of the hearing issues.... a petition for intervention showing the basis of its interest." The ALJ correctly held that Ameritel's allegation of party status that it was the successor-in-interest to Ameritel, Inc. rested "solely on the bare declaration of Richard Rowley" and offered "no supporting evidence for Rowley's assertion." *Rowley did not offer any explanation about how, when and by whom Ameritel, Inc., a corporation, had been changed to a partnership.* [Emphasis added.]

Review Board MO&O, at ¶6.

THE REVIEW BOARD MO&O CONFLICTS WITH 47 USC 309(e) AND 47 CFR 1.223(a) BECAUSE THE REVIEW BOARD APPLIED THE STRICTER STANDARD OF 47 USC 309(d), WHICH IS EXPRESSLY LIMITED TO PETITIONS TO DENY, IN DETERMINING THE ADEQUACY OF AN INTERVENTION PETITIONER'S SHOWING OF THE BASIS FOR ITS INTEREST UNDER 47 USC 309(e).

2. 47 USC 309(e) provides in relevant part that:

When the Commission has [designated any application to which subsection (a) of this section applies] for hearing the *parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing for intervention showing the basis for their interest* not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. [Emphasis added.]

By the plain language of the statute, a petition to intervene need only "show a basis for [the petitioner's] interest". The statute does not require that this showing be under oath.⁵ 47 USC 309(d)(1) sets forth the so-called protest rule, including the requirements of a petition to deny any application to which 47 USC 309(b) applies:

The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. *Such allegations shall of*

⁵However, the Commission added a requirement that *a petition to intervene* be filed under oath. 47 CFR 1.223(a).

fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. [Emphasis added.]

By the plain language of the statute, a petition to deny must set forth "specific allegations of fact to show that the petitioner is a party in interest". Moreover, except for those specific allegations of which official notice may be taken, those specific allegations must be "supported by affidavit of a person or persons with personal knowledge thereof".

3. It is incontrovertible that these are distinctly different standards applicable to different actions.⁶ In an intervention a petitioner seeks to become a party to the application proceeding. In an action under the protest rule, the petitioner seeks only to deny the application. In this latter instance, the petitioner often has no basis for becoming a party to the application proceeding, but may be significantly harmed if the application is granted. Application of the 47 USC 309(d) standard to a petition to intervene would completely emasculate the distinctions drawn by plain statutory language.

4. The Review Board unquestionably and incorrectly applied the more strict standard of 47 USC 309(d) to the Petition. Therefore, the Review Board's affirmation must be reversed.

THE REVIEW BOARD MO&O INVOLVES A QUESTION OF LAW WHICH HAS NOT PREVIOUSLY BEEN RESOLVED BY THE COMMISSION BECAUSE IT REQUIRED AMERITEL TO ESTABLISH IN ITS PETITION *MORE THAN* A SHOWING OF THE BASIS FOR ITS INTEREST.

5. The Petition stated Ameritel is an Ohio general partnership that is the successor-in-interest to Ameritel, Inc., the fifth-selected MX applicant for the nonwireline cellular authori-

⁶Indeed, the requirement that a petition to deny contain "*specific* allegations of fact" was introduced into the Communications Act at the same time that the intervention provision was added. (See 74 Stat. 888, 890-891 (1960).) Obviously, if Congress intended that the same standard for a showing of interest be applicable to both a petition to deny and a petition to intervene, it would not have used different language.

zation to serve the Atlantic City, New Jersey Metropolitan Statistical Area.⁷ Ameritel's Petition was supported by a Declaration under penalty of perjury by Richard Rowley, a general partner in Ameritel.⁸ As the Review Board has noted⁹, the Commission has recognized that a MX applicant has a sufficient basis for its interest to intervene under 47 USC 309(e).¹⁰

6. The Review Board stated Ameritel offered "no supporting evidence for Rowley's assertion" and that as required by 47 USC 309(e) Rowley failed to "offer any explanation about how, when and by whom Ameritel, Inc., a corporation, had been changed to a partnership."¹¹ There is no basis under law for the Review Board's action requiring "supporting evidence" and an explanation of "how, when and by whom" an entity petitioning to intervene obtained its status. The Review Board purports to graft the showing standard of 47 USC 309(d)(1) onto 47 USC 309(e), and, in effect, requires proof of the petitioner's interest at the time of filing of the petition to intervene. The statute simply requires a showing *of the basis* for the interest at that time.

THE REVIEW BOARD MO&O IS EXPRESSLY FOUNDED UPON ERRONEOUS FINDINGS AS TO IMPORTANT AND MATERIAL QUESTIONS OF FACT.

7. The ALJ found as fact that Ameritel, Inc. ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988.¹² However, although Ameritel, Inc. no longer existed as a separate entity, it does not follow that the interests of

⁷Petition at n.7, ¶1.

⁸*Id.*, Exhibit 2.

⁹*Review Board MO&O*, at ¶6.

¹⁰*Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991) (subsequent history omitted).

¹¹*Review Board MO&O* at ¶6.

¹²*ALJ MO&O* at ¶3.

Ameritel, Inc. (including its MX application) ceased to exist. To the contrary, as set forth in the same official records upon which the ALJ based this finding of fact,¹³ as a result of the merger, Ameritel, Inc. (including its MX application and other interests) continued to exist as Metrotec, Inc. Therefore, the ALJ erred in finding that this fact (i.e., Ameritel, Inc. ceased to exist as a separate entity when it was merged into Metrotec, Inc.) does not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc.

8. The ALJ also found as fact that Ohio law requires a general partnership to make a fictitious name registration and that Ameritel had not done so.¹⁴ This finding by the ALJ is wrong as a matter of Ohio law. Again as set forth in the same official records upon which the ALJ based this finding of fact,¹⁵ Ohio Revised Code §1329.01(A)(2) expressly provides that a name which is registered as a trade name or which is entitled to be registered as a trade name is not to be registered under the Ohio Fictitious Name Statute. The ALJ did not find that Ameritel had not registered the trade name "Ameritel" or that Ameritel was not entitled to register "Ameritel" as a trade name.

9. The ALJ further found as fact that a new entity also calling itself Ameritel, Inc. was incorporated in Ohio in 1993.¹⁶ The mere fact that a new entity also calling itself Ameritel, Inc. was incorporated in Ohio in 1993 cannot logically give rise to any inference regarding

¹³*Comments on Petition To Intervene* filed by the Wireless Telecommunications Bureau and Telephone and Data Systems, Inc., Attachment C at ¶2 MANNER OF MERGER, Attachment D at Exhibit 2, Attachment E, and Attachment F at ARTICLE II.

¹⁴*ALJ MO&O* at ¶3.

¹⁵*Amcell Opposition*, Exhibit 1, Ohio Revised Code §1329.01.

¹⁶*ALJ MO&O* at ¶3.

Ameritel's status as a successor-in-interest to Ameritel, Inc.¹⁷ Therefore, the ALJ erred in finding that this available fact (i.e., that a new entity also calling itself Ameritel, Inc. was incorporated in Ohio in 1993) does not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc.

10. The only findings of fact in the ALJ MO&O were the three erroneous findings set forth above in ¶¶ 7, 8 and 9, and therefore must have formed the basis upon which the Petition was denied by the ALJ.

Accordingly, Ameritel hereby respectfully requests that the Commission grant this Application For Review, reverse the *Review Board MO&O*, grant Ameritel's Petition to Intervene as a matter of right in the above-captioned proceeding, and designate Ameritel as a party-in-interest in the above-captioned proceeding.

Respectfully submitted,
AMERITEL

By: 
Howard S. Robbins

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Its Attorneys

August 7, 1995

¹⁷Indeed, Ameritel's principals were unaware of that purported corporation prior to receipt of a copy of the Oppositions filed herein, and, consequently, could not have commented thereon in the Petition.

Review Board MO&O

Exhibit 1

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of

ELLIS THOMPSON File No. 14261-CL-P-134-A-86
CORPORATION

For Facilities in the Domestic Public
Cellular Radio Telecommunications
Service on Frequency Block A in
Market No. 134
Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995;

Released: July 7, 1995

By the Review Board: MARINO (Chairman) and
GREENE.

1. On March 27, 1995, Ameritel filed an Appeal pursuant to 47 CFR § 1.301(a)(1) from the denial by Administrative Law Judge Joseph Chachkin (ALJ) of its petition to intervene in this proceeding as a party-in-interest. *Memorandum Opinion and Order*, FCC 95M-68, released March 7, 1995 (MO&O). Ameritel claims that the ALJ's ruling is in direct conflict with *Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991) (subsequent history omitted), which held that both Congress and the Commission have stated that a mutually exclusive applicant has a right to intervene as a party-in-interest on the question of whether a lottery winner is fully qualified. Appeal at 3-4. Oppositions were filed on April 6, 1995, respectively, by Ellis Thompson Corporation, American Cellular Network Corp, and Telephone and Data Systems, Inc. We affirm the ALJ's denial of intervention because Ameritel's original petition to intervene did not establish, as required by 47 USC § 309(d) and (e) of the Communications Act of 1934, as amended, and 47 CFR § 1.223(a) of the Commission's Rules, that Ameritel is a mutually exclusive applicant and therefore entitled to intervene as a "party-in-interest." We also agree with the ALJ that Ameritel failed to establish that its participation would assist the Commission in resolving the designated issue and that it should, therefore, be permitted to intervene as a matter of discretion.

2. *Background*: To expedite the licensing of cellular radio facilities, the Commission streamlined its comparative proceedings so that the initial selection from a pool of competing applications is made by lottery rather than the traditional comparative hearing. See *Algreg Cellular Engineering*, 9 FCC Rcd 5098, at 5108 ¶ 8 (Rev. Bd. 1994) (subsequent history omitted). After selection of a winner, competing applicants can challenge the winning applicant's basic qualifications; and, when necessary, a trial-type hearing will be designated pursuant to 47 USC 309(e). See *Algreg Cellular*, *supra*, 6 FCC Rcd at 5300 ¶ 8. Here, the

application of Ellis Thompson was the winning lottery application for Atlantic City, New Jersey. Following a court remand, however, the Commission designated Ellis Thompson's application for hearing to determine whether "a third party became a real party in interest in the Thompson application contrary to the Commission's rule." *Hearing Designation Order*, 60 Fed. Reg. 1776, published on January 5, 1995; 9 FCC Rcd 7138 (1994) (HDO). Ameritel was not named a party to the hearing.

3. On February 6, 1995, Ameritel filed its petition to intervene asserting that Ameritel is an Ohio general partnership and the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant for the Atlantic City, New Jersey cellular authorization, and that, pursuant to unambiguous Commission precedent, including *Algreg Cellular*, *supra*, it was entitled to intervene as a party-in-interest as a matter of right. To support the claim of being the successor-in-interest to Ameritel, Inc., Ameritel attached to its petition the following declaration under penalty of perjury by Richard Rowley:

1. I am a general partner in Ameritel ("Ameritel"), successor-in-interest to Ameritel, Inc.
2. I have reviewed the foregoing "Petition To Intervene" ("Petition") to be filed on behalf of Ameritel with the Federal Communications Commission ("Commission") with respect to the hearing designated by the Commission in CC Docket No. 94-136 in connection with the application of Ellis Thompson Corporation for nonwireline cellular facilities to operate on frequency block A in Atlantic City, New Jersey (File No. 14261-CL-P-134-A-86).
3. Except for those facts of which official notice may be taken by the Commission, all facts set forth in the foregoing Petition are true and correct of my own personal knowledge and belief.

Comments and oppositions were filed by other parties to the hearing, including the Wireless Telecommunications Bureau.

4. On March 7, 1995, the ALJ denied the petition to intervene as of right, stating:

[1] Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the nonwireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion.

[2] In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties, based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity called Ameritel, Inc., was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at very least, file a fictitious name report with the Secretary of State (see Amcell Opposition, Exhibit 1).

MO&O at ¶ 3.

5. In its appeal, Ameritel urges that it "clearly stated its status and its right to intervene" in its original petition and that this showing was "unequivocally supported by a Declaration under penalty of perjury by Richard Rowley, a person with personal knowledge of these facts," and further argues that the ALJ's erroneous ruling was caused when the parties opposing intervention "mounted a campaign of disinformation based on incomplete, inaccurate and misleading allegations." Appeal at 3-4. Ameritel claims that, at minimum, it should have been afforded the opportunity to reply to the oppositions before the ALJ denied its petition. *Id.* at 4-5. Ameritel charges that by denying it intervention, the ALJ acted arbitrarily, contrary to established precedent, and in violation of its due process rights. *Id.* at 5.

6. *Discussion:* Ameritel's argument ignores a fatal legal flaw in its original petition to intervene: its petition did not contain specific allegations of fact sufficient to show that Ameritel was the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant, and, therefore, a party-in-interest. Section 309(d)(1) of the Communications Act specifically provides:

The petition shall contain specific allegations of fact sufficient to show that petitioner is a party in interest.... Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

Section 1.223(a) of the Commission Rules requires a party-in-interest to file "under oath and not more than 30 days after publication in the Federal Register of the hearing issues.... a petition for intervention showing the basis of its interest." The ALJ correctly held that Ameritel's allegation of party status that it was the successor-in-interest to Ameritel, Inc. rested "solely on the bare declaration of Richard Rowley" and offered "no supporting evidence for Rowley's assertion." Rowley did not offer any explanation about how, when, and by whom Ameritel, Inc., a corporation, had been changed to a partnership. Nor did Ameritel's petition incorporate, or ask the ALJ to take official notice of, any documents which supported the legal conclusion that it was the successor-in-interest to Ameritel, Inc. *Algreg Cellular*, 6 FCC Rcd at 5300, on which Ameritel mainly relied, is to no avail because, unlike in *Algreg*, where the party requesting intervention established in its petition that it was a mutually exclusive applicant, Ameritel did not do so here.

7. Some sixty days after publication of the *Hearing Designation Order*, para. 2 above, and subsequent to the ALJ's ruling, Ameritel on March 21, 1995, filed a response to the oppositions, attaching a new four page affidavit and three pages of documents to support its claim that it was the successor-in-interest to Ameritel, Inc. Appeal, Attach Ex. 5 at ex. 1 pp. 1-4. By Order, FCC 95M-84, released March 24, 1995, at n.l. the ALJ stated that "Ameritel provides no explanation for its inexcusably tardy pleading, which will be dismissed." Ameritel now argues that the ALJ should have awaited or sought its reply to the oppositions before denying intervention. Appeal p. 4-5. No authority is cited to support this argument and Ameritel itself recognizes that Section 1.294 of the Rules does not permit a response to an opposition to petition to intervene. We note that Section 309(d)(1) of the Act, 47 USC § 309(d)(1), contemplates the filing of only a petition to intervene to which the applicant "shall be given an opportunity to reply." Thus, Ameritel's

response was not only unauthorized by these legal requirements: it was also filed long after the 30-day time period, a date certain for justifying intervention established by 47 USC § 309(e), and 47 CFR § 1.223(a). See also *Algreg Cellular*, *supra*, 6 FCC Rcd at 5300 ¶ 6 referring to 1964 amendment to § 309 establishing a thirty-day "date certain" for intervention. Given these specific statutory and Commission requirements, we do not believe that it is appropriate for the Board to consider the substance of Ameritel's untimely and unauthorized response or the parties' oppositions thereto. We note that the pleading merely attempts to establish Ameritel's status as the successor-in-interest but does not raise any public interest questions about Ellis Thompson that would warrant Commission attention. The ALJ did not err in denying intervention as of right.

8. In the last footnote of its Appeal (at 5, n.9), Ameritel claims that it was also incorrectly denied discretionary intervention by the ALJ. Section 1.223(b) of the Commission's rules, 47 CFR § 1.223(b), which confers the ALJ with discretion to allow intervention, requires, among other things, that a petitioner must show how its "participation will assist the Commission in the determination of the issues in question." Applying the Commission's requirements, the ALJ reasoned that:

Other than to offer the Commission its assistance in 'fully exploring the relationship between' the parties to this proceeding, Ameritel does not demonstrate that it will make any specific contribution to the resolution of the designated issue. Nowhere does Ameritel allege, much less show, that if it is not allowed to intervene, important issues of fact or law will not be adequately raised or argued. Ameritel appears to believe its presence is required to ensure that the examination of Ellis Thompson's qualifications as a licensee in the hearing is sufficiently thorough. Ameritel ignores the fact that the Wireless Bureau is a party. Ameritel offers no evidence that the Wireless Bureau will be less than vigorous in its prosecution of this case. The Presiding Judge is fully confident that the Bureau's participation and that of the other named parties assures that the designated issue will be fully explored.

MO&O at ¶ 6. We agree with the ALJ that Ameritel did not demonstrate that "it will make any specific contribution to the resolution of the designated issue." We therefore affirm his ruling. See *Telephone Data Systems, Inc.*, 9 FCC Rcd 2780, 2781 (Rev. Bd. 1994) (denial of discretionary intervention where petitioner had failed to show that "its participation will assist the Commission in the resolution of the issues at hand").

9. ACCORDINGLY, IT IS ORDERED, That Ameritel's Appeal filed on March 27, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

ALJ MO&O

Exhibit 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95M-68

In re Application of)	CC DOCKET NO. 94-136
)	
ELLIS THOMPSON CORPORATION)	File No. 14261-CL-P-134-A-86
)	
For facilities in the Domestic)	
Public Cellular Radio Telecom-)	
munications Service on Frequency)	
Block A in Market No. 134,)	
Atlantic City, New Jersey)	

MEMORANDUM OPINION AND ORDER

Issued: March 3, 1995; Released: March 7, 1995

1. Under consideration are "Petition To Intervene" filed February 6, 1995 by Ameritel, Comments On Petition To Intervene filed February 15, 1995 by The Wireless Telecommunications Bureau and Telephone and Data Systems, Inc., Opposition To Petition For Leave To Intervene filed February 15, 1995 by American Cellular Network Corp. (Amcell), and Opposition To Petition To Intervene filed February 21, 1995 by Ellis Thompson Corporation.

2. Ameritel seeks to intervene as a matter of right pursuant to Section 1.223(a) of the Rules. In support, Ameritel claims that it is "an Ohio general partnership that is the successor-in-interest to Ameritel, Inc." (Petition, p. 2, n. 7). Ameritel, Inc. is the fifth selected MX applicant for the Atlantic City non-wireline authorization.

3. Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the non-wireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion. In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties, based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity also calling itself Ameritel, Inc. was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at the very least, file a fictitious name report with the Secretary of State (see Amcell Opposition, Exhibit 1). Therefore, Ameritel's request to intervene as a matter of right will be denied.

4. In the alternative, Ameritel argues that it should be allowed to intervene pursuant to the discretionary authority specified in Section 1.223(b) of the Rules. However, Section 1.223(b) expressly requires that a petitioner seeking intervention: (1) "must set forth the interest of petitioner in the proceedings," and (2) "must show how such petitioner's participation will assist the Commission in the determination of the issues in question." The subject Petition is insufficient on both counts. Ameritel's case for discretionary intervention rests solely on its contention that it is the successor-in-interest to Ameritel, Inc. However, for the reasons discussed above, that contention has been rejected.

5. Ameritel has also failed to show how its participation "will assist the Commission in the determination of the issues in question." As the Commission has stated:

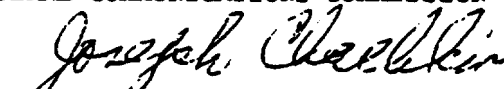
Such showing would require that the intervenors raise substantial issues of law or fact which have not or would not otherwise be

properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the intervenor the status of a party. Victor Muscat, 31 FCC 2d 620, 621 (1971).

6. Other than to offer the Commission its assistance in "fully exploring the relationship between" the parties to this proceeding, Ameritel does not demonstrate that it will make any specific contribution to the resolution of the designated issue. Nowhere does Ameritel allege, much less show, that if it is not allowed to intervene, important issues of fact or law will not be adequately raised or argued. Ameritel appears to believe its presence is required to ensure that the examination of Ellis Thompson's qualifications as a licensee in the hearing is sufficiently thorough. Ameritel ignores the fact that the Wireless Bureau is a party. Ameritel offers no evidence that the Wireless Bureau will be less than vigorous in its prosecution of this case. The Presiding Judge is fully confident that the Bureau's participation and that of the other named parties assures that the designated issue will be fully explored. Ameritel's request to intervene pursuant to Rule 1.223(b) is, therefore, also denied.

Accordingly, IT IS ORDERED, That the "Petition To Intervene" filed February 6, 1995 by Ameritel IS DENIED

FEDERAL COMMUNICATIONS COMMISSION


Joseph Chachkin
Administrative Law Judge

AMERITEL PETITION

Exhibit 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	CC DOCKET NO. 94-136
)	
ELLIS THOMPSON CORPORATION)	File No. 14261-CL-P-134-A-86
)	
For Facilities in the)	
Domestic Public Cellular)	
Radio Telecommunications)	
Service on Frequency Block A)	
in Market No. 134, Atlantic)	
City, New Jersey)	

To: Administrative Law Judge Joseph Chachkin

PETITION TO INTERVENE

Ameritel ("Ameritel"), by its attorneys and pursuant to Section 309(e) of the Communications Act of 1934, as amended (the "Act"),¹ and Section 1.223 of the Commission's Rules,² hereby requests that it be permitted to intervene as a party in interest in the hearing designated by the Commission in the above-captioned matter.³ In support of this Petition, the following is respectfully shown:

I. Factual Background

1. By Public Notice dated April 23, 1986,⁴ the Commission announced the first ten (10) mutually-exclusive ("MX") applications that had been selected in a lottery held on April 21, 1986, for the

¹47 U.S.C. §309(e).

²47 C.F.R. §1.223.

³The above-captioned application was designated for hearing in Ellis Thompson Corporation, CC Docket No. 94-136, 9 FCC Rcd 7138 (1994) (hereinafter "HDO").

⁴Public Notice, Mimeo No. 4024 (April 23, 1986) (hereinafter "PN"). A copy of the PN is attached hereto as Exhibit 1.

nonwireline cellular authorization ("Authorization") to serve the Atlantic City, New Jersey Metropolitan Statistical Area ("MSA").⁵ The first-selected MX application was the above-captioned application ("Application") of Ellis Thompson.⁶ The fifth-selected MX application was the application of Ameritel, Inc.⁷

2. Pursuant to the results of the April 21, 1986, lottery, the Commission processed and granted the Application and issued Thompson the Authorization to construct and operate the nonwireline Atlantic City cellular system (the "System"). Pursuant to a management agreement with American Cellular Network Corporation ("Amcell"), Thompson constructed and currently operates the System.⁸

3. As specified in the HDO, however, pursuant to timely-filed appeals, the Commission has now rescinded the Authorization pending the outcome of a hearing for the purpose of resolving the following issue:

To determine whether [Amcell] is a real-party-in-interest in the application of [Thompson] ... and, if so, the effect thereof on [Thompson's] qualifications to be a

⁵Market No. 134, Frequency Block A.

⁶The original applicant in the Application was Ellis Thompson. PN at 4. On November 21, 1988, however, the Commission granted its consent to the pro forma assignment of the Authorization from Ellis Thompson to Ellis Thompson Corporation ("Thompson"). As a result, the HDO captioned Thompson as the applicant. For ease of reference throughout this pleading, Thompson will be specified as the applicant and original holder of the Authorization.

⁷File No. 14310-CL-P-134-A-86. It should be noted that the petitioner herein, Ameritel, is an Ohio general partnership that is the successor-in-interest to Ameritel, Inc. For ease of reference throughout this pleading, Ameritel will be specified as the original applicant.

⁸See HDO at 7138, 7143.

Commission licensee.⁹

In the event that Thompson is found unqualified to be a Commission licensee, the Application will be dismissed and Thompson will no longer be the licensee of the System. In that case, the Commission must then examine the qualifications of the alternative lottery selectees in descending order of their rank as established by the Commission's April 21, 1986, lottery.¹⁰ The next-highest ranked lottery selectee found to be qualified under the Commission's Rules will be granted the Authorization.¹¹

**II. Ameritel's Status As An MX Applicant
And Fifth-Ranked Lottery Selectee
Provides It Standing To Intervene
In This Proceeding As A Matter Of Right**

4. Section 1.223(a) of the Commission's Rules provides, in relevant part, that:

Where ... the Commission has failed to notify and name as a party to the hearing any person who qualifies as a party in interest, such person may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues ... a petition for intervention showing the basis of its interest. ... Where the person's status as a party in interest is established, the petition to intervene will be granted.

47 C.F.R. §1.223(a); see also 47 U.S.C. §309(e).

In Algreg Cellular Engineering, the Review Board held unequivocally that an intervenor's status as an MX applicant provided the

⁹Id. at 7143. It should be noted that Thompson was granted interim authority to continue operating the System pending the outcome of the hearing. Id.

¹⁰See Report and Order, CC Docket No. 83-1096, 98 FCC 2d 175, 219-221 (1984), recon., 101 FCC 2d 577 (1985); see also 47 C.F.R. §1.823.

¹¹ Id.

intervenor standing to intervene in a hearing proceeding as a matter of right pursuant to Section 309(e) of the Act and Section 1.223(a) of the Commission's Rules.¹²

5. As demonstrated above, Ameritel is an MX applicant for the Authorization. As the fifth-ranked selectee in the Commission's April 21, 1986, lottery, Ameritel could become the tentative selectee and ultimately obtain the Atlantic City Authorization.¹³ Based on these facts, Ameritel has standing to intervene as a matter of right in the above-captioned hearing proceeding.¹⁴ Accordingly, Ameritel respectfully requests that the instant Petition should be granted.¹⁵

III. Ameritel Should Also Be Permitted To Intervene To Assist In Determination Of The Issue Designated In The HDO

6. Although Ameritel is entitled to intervene in the above-captioned hearing as a matter of right pursuant to Section 1.223(a)

¹²Algreg Cellular Engineering, CC Docket No. 91-142 6 FCC Rcd 5299, 5300 (Rev.Bd. 1991) (hereinafter "Algreg"); see also Virginia Communications, Inc., 2 FCC Rcd 1895 (1987) (competing applicants for MMDS licenses were parties in interest with respect to the determination of whether lottery winners were qualified); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C.Cir. 1956) (the Commission "may not deny intervention to a party in interest merely because it thinks his participation would not aid its decisional process.")

¹³See note 10, supra.

¹⁴Algreg, 6 FCC Rcd at 5299.

¹⁵It should be noted that the HDO was published in the Federal Register on January 5, 1995. 60 Fed. Reg. 1776. Accordingly, the instant Petition is timely filed within thirty (30) days of such publication as required by Section 309(e) of the Act and Section 1.223(a) of the Commission's Rules. 47 U.S.C. §309(e); 47 C.F.R. §1.223(a). In addition, attached hereto as Exhibit 2 is a Declaration on behalf of Ameritel supporting the instant Petition as required by Section 1.223(a) of the Commission's Rules. 47 C.F.R. §1.223(a).

of the Commission's Rules, Ameritel also respectfully submits that it should be allowed to intervene pursuant to the discretionary authority specified in Section 1.223(b) of the Commission's Rules. Specifically, Section 1.223(b) provides that the presiding officer may allow any other person to intervene upon a showing that the "petitioner's participation will assist the Commission in the determination of the issues in question...."¹⁶

7. In the instant case, the HDO designated only three non-Commission parties to the proceeding: Thompson, the applicant; Amcell, the entity that constructed the System and manages it pursuant to a management agreement (and who has other contractual relationships with Thompson relating to the Authorization); and Telephone and Data Systems, Inc. ("TDS"), the entity that holds an option to purchase Thompson's interest in the Authorization.¹⁷ Neither Amcell nor TDS were among the ten MX applicants selected in the Commission's April 21, 1986, lottery for the Atlantic City Authorization. In point of fact, if Thompson is found unqualified to be a Commission licensee, neither Amcell nor TDS will have any interest in the Authorization or right to operate the System. Accordingly, even though Amcell and TDS have engaged in extensive litigation in this proceeding to date, a finding that Thompson is unqualified to hold the Authorization will result in neither TDS nor Amcell retaining any interest in the Atlantic City Authorization. This "lose-lose" scenario substantially lessens the incentive of both TDS and Amcell to fully investigate and examine

¹⁶47 C.F.R. §1.223(b).

¹⁷HDO at 7138, 7143.

the issue designated in the HDO. Success in such efforts would result in Thompson's loss of the Authorization and would leave neither TDS nor Amcell with any interest in the Authorization or right to operate the System.

8. Ameritel, on the other hand, is an MX applicant for the Authorization with every incentive to fully examine Thompson's qualifications. If Thompson is found unqualified to be a Commission licensee, Ameritel -- unlike TDS and Amcell -- stands in line to receive the Authorization. As a result, Ameritel respectfully submits that its participation in the above-captioned proceeding will assist the Commission in fully exploring the relationship between Thompson and Amcell and whether that relationship renders Thompson unqualified to be a Commission licensee. Ameritel's interests in participating in the above-captioned hearing proceeding are different than those of TDS or Amcell. Of these parties, only Ameritel ultimately stands to benefit from a finding that Thompson is unqualified to be a Commission licensee.


9. Accordingly, Ameritel respectfully submits that the instant Petition should also be granted pursuant to the discretionary authority specified in Section 1.223(b) of the Commission's Rules.¹⁸

¹⁸This Petition is both timely and properly supported by the Declaration attached hereto as Exhibit 2 as required by Section 1.223(b) of the Commission's Rules. See note 15, supra.

WHEREFORE, for all of the foregoing reasons, Ameritel hereby respectfully requests grant of the instant Petition To Intervene.

Respectfully submitted,

AMERITEL

By: 

Richard S. Becker
James S. Finerfrock
Jeffrey E. Rummel

Its Attorneys

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(202) 833-4422

Date: February 6, 1995

Exhibit 1

APRIL 23, 1986, PM

Market 131 Rockford, Illinois

- | | | |
|-----|---------------------|--|
| 1. | 13462-CL-P-131-A-86 | National Cellular Communications, Inc. |
| 2. | 15024-CL-P-131-A-86 | Warren American Oil Company |
| 3. | 13710-CL-P-131-A-86 | Dr. A. L. Rice |
| 4. | 12816-CL-P-131-A-86 | Gauss Associates |
| 5. | 17501-CL-P-131-A-86 | Ronald & Darlene Baccino |
| 6. | 14569-CL-P-131-A-86 | Miller Communications, Inc. |
| 7. | 15896-CL-P-131-A-86 | C. K. M. L. Partnership |
| 8. | 10748-CL-P-131-A-86 | Mary Ruth Roberts |
| 9. | 14406-CL-P-131-A-86 | David S. Smith |
| 10. | 11844-CL-P-131-A-86 | Edward J. Conlon Cellular Company |

Market 132 Kalamazoo, Michigan

- | | | |
|-----|---------------------|-------------------------------------|
| 1. | 16546-CL-P-132-A-86 | GTRW Partnership |
| 2. | 11269-CL-P-132-A-86 | Metromedia Telecommunications, Inc. |
| 3. | 10239-CL-P-132-A-86 | R & W Partnership |
| 4. | 15486-CL-P-132-A-86 | Taylor Interactive Components, Inc. |
| 5. | 18088-CL-P-132-A-86 | WWB Cellular Joint Venture |
| 6. | 13459-CL-P-132-A-86 | ACLA Investments |
| 7. | 14233-CL-P-132-A-86 | EE Partners |
| 8. | 15175-CL-P-132-A-86 | J.T.A., Inc. |
| 9. | 12073-CL-P-132-A-86 | Charles M. Miller |
| 10. | 11299-CL-P-132-A-86 | Alpha Cellular |

Market 133 Manchester-Nashua, New Hampshire

- | | | |
|-----|---------------------|--------------------------|
| 1. | 13998-CL-P-133-A-86 | JHP-Partnership |
| 2. | 12024-CL-P-133-A-86 | Connolly Associates |
| 3. | 10787-CL-P-133-A-86 | Pliny A. Price |
| 4. | 16195-CL-P-133-A-86 | A. Douglas Sink, Sr. |
| 5. | 11642-CL-P-133-A-86 | Reality Properties, Inc. |
| 6. | 13521-CL-P-133-A-86 | David L. Fehrenkamp |
| 7. | 13643-CL-P-133-A-86 | Richard J. Rose |
| 8. | 15508-CL-P-133-A-86 | The Blythe Group |
| 9. | 13254-CL-P-133-A-86 | Theodore H. Koenig, Jr. |
| 10. | 14711-CL-P-133-A-86 | Dr. Financial |

Market 134 Atlantic City, New Jersey

- | | | |
|-----|---------------------|-----------------------------------|
| 1. | 14261-CL-P-134-A-86 | Ellis Thompson |
| 2. | 12179-CL-P-134-A-86 | J. Dudeck Communications |
| 3. | 14566-CL-P-134-A-86 | RJR Communications, Inc. |
| 4. | 17649-CL-P-134-A-86 | F & F Communications |
| 5. | 14310-CL-P-134-A-86 | Ameritel, Inc. |
| 6. | 12812-CL-P-134-A-86 | Caman Car Phone |
| 7. | 12516-CL-P-134-A-86 | Christopher Kane |
| 8. | 11315-CL-P-134-A-86 | S. Ouchi Communications |
| 9. | 15284-CL-P-134-A-86 | Tom McAdam |
| 10. | 14608-CL-P-134-A-86 | Metrocall of North Carolina, Inc. |

Exhibit 2

DECLARATION OF RICHARD ROWLEY